UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| THE CENTER FOR REPRODUCTIVE LAW & POLICY, JANET BENSHOOF, ANIKA RAHMAN, KATHERINE HALL MARTINEZ, JULIA ERNST, LAURA KATZIVE, MELISSA UPRETI, and CHRISTINA ZAMPAS, | : | |
| Plaintiffs, | : | |
| v. | : | 01 Civ. 4986 (LAP) |
| GEORGE W. BUSH, in his official capacity as President of the United States; COLIN POWELL, in his official capacity as Secretary of State; and ANDREW NATSIOS, in his official capacity as Administrator of the United States Agency for International Development, | : | |
| Defendants. | : | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants George W. Bush, as President of the United States; Colin Powell, as Secretary of State; and Andrew Natsios, as Administrator of the United States Agency for International Development ("USAID") (collectively, "Defendants" or the "Government") respectfully submit this memorandum of law in support of their motion to dismiss the complaint (the "Complaint"). The Complaint, filed by plaintiff Center for Reproductive Law & Policy ("CRLP") and individual staff members (collectively with CRLP, "Plaintiffs"), fails either to state a claim upon which relief can be granted or to provide a basis for this Court's assertion of subject matter jurisdiction.

This lawsuit raises no new issues. In Planned Parenthood v. AID, the Second Circuit definitively answered all questions raised by Plaintiffs, whose claims are even weaker on the merits than those already

rejected by the Circuit. Essentially, Plaintiffs here claim a First Amendment right to compel the Government to subsidize other entities – namely, foreign organizations – with whom Plaintiffs allegedly associate, and to offer the subsidy on terms preferable to Plaintiffs. Those foreign organizations, however, have no rights under the U.S. Constitution, and Plaintiffs certainly lack any right under the Constitution, or any other law, to compel the Government to grant a subsidy, let alone the subsidy at issue here. Indeed, Plaintiffs' alleged harm – that, absent the preferred subsidy, those foreign organizations might not choose to associate with Plaintiffs – is far too speculative and remote to confer standing. Plaintiffs' other claims are equally meritless. Accordingly, Defendants' motion should be granted and the Complaint dismissed.

**Preliminary Statement**

On January 22, 2001, President George W. Bush announced the restoration of the "Mexico City Policy" (the "Policy"), which concerns federal foreign assistance for family planning. Such assistance is typically provided to foreign governments, multilateral organizations, and nongovernmental organizations ("NGOs"); the last category comprises domestic NGOs ("DNGOs") and foreign NGOs ("FNGOs"). The Policy provides that, as a condition of receiving USAID assistance for family planning, an FNGO is prohibited during the term of the assistance from using its own funds to perform or actively promote abortion as a method of family planning abroad. By contrast, a DNGO that receives USAID assistance for family planning is not prohibited from using its own funds to perform or actively promote abortion as a method of family planning domestically or abroad. A DNGO must agree only that it will not enter into subagreements with FNGOs that perform or actively promote abortion as a method of family planning abroad. The Policy does not apply to USAID assistance for family planning to foreign governments or multilateral organizations.

The Policy was originally announced by the Reagan administration in 1984 at the United Nations International Conference on Population in Mexico City. The Policy continued in force under the prior Bush administration. Although President Clinton rescinded it in 1993, President Bush formally restored it on March 28, 2001, when he issued a memorandum entitled "Restoration of the Mexico City Policy." 66 Fed. Reg. 17,303 (2001).[1] The memorandum directed the USAID administrator to implement the Policy by including certain language (the "Standard Clause") in grants, cooperative agreements, and grants under contracts (collectively, "assistance agreements"). See id.

Under the Reagan and prior Bush administrations, three lawsuits were filed -- one in this Court, and two in the District of Columbia -- challenging the Policy and Standard Clause on constitutional and statutory grounds. The challenges were ultimately rejected in each case, with the Second and D.C. Circuits issuing

[1]On January 22, 2001, President Bush issued a Memorandum to the Administrator of USAID, directing him to restore the Policy. The Policy was initially implemented through USAID's Contract Information Bulletin 01-03 that was issued on February 15, 2001. CIB 01-03 was cancelled on March 23, 2001, by instruction of President Bush, who issued the memorandum entitled "Restoration of the Mexico City Policy" on March 28, 2001.

thorough opinions.[2]

The principal claim in this case -- advanced under the First Amendment and equal protection doctrine -- is controlled by PPFA IV and should therefore be dismissed. See infra Point I. The Policy and Standard Clause, as restored in March 2001, are the same in all relevant respects as they were when originally issued and litigated. Moreover, the Second Circuit's opinion in PPFA IV is still good law. In addition, the principal claim here was expressly advanced, and rejected, in all three of the prior actions. That claim, which challenges the Standard Clause's restrictions on USAID's direct assistance agreements with FNGOs for family planning has been referred to as the "buying off" claim. See DKT IV, 887 F.2d at 294, 298; PPFA IV, 915 F.2d at 63. The claim is so named because it alleges that the restriction on direct assistance agreements with FNGOs "buys off" those FNGOs from associating with, or speaking or listening to, the DNGO plaintiff about the plaintiff's abortion-related activity. See DKT IV, 887 F.2d at 294; PPFA

[2]The case filed in this Court generated four opinions: Planned Parenthood Fed'n of Am. v. AID, 670 F. Supp. 538 (S.D.N.Y. 1987) ("PPFA I"); Planned Parenthood Fed'n of Am. v. AID, 838 F.2d 649 (2d Cir. 1988) ("PPFA II"); Planned Parenthood Fed'n of Am. v. AID, 1990 WL 26306 (S.D.N.Y. Mar. 7 1990) ("PPFA III"); and Planned Parenthood Fed'n of Am. v. AID, 915 F.2d 59 (2d Cir. 1990) ("PPFA IV"). The first case filed in the District of Columbia also generated four opinions: DKT Memorial Fund v. AID, 630 F. Supp. 238 (D.D.C. 1986) ("DKT I"); DKT Memorial Fund v. AID, 810 F.2d 1236 (D.C. Cir. 1987) ("DKT II"); DKT Memorial Fund v. AID, 691 F. Supp. 394 (D.D.C. 1988) ("DKT III"); and DKT Memorial Fund v. AID, 887 F.2d 275 (D.C. Cir. 1989) ("DKT IV"). The remaining case generated one opinion: Pathfinder Fund v. AID, 746 F. Supp. 192 (D.D.C. 1990) ("Pathfinder").

IV, 915 F.2d at 63.

In PPFA IV, the Second Circuit rejected the "buying off" claim under a long line of Supreme Court cases holding that the denial of a subsidy -- here, USAID funding of FNGOs seeking to perform or actively promote abortion -- does not violate the DNGOs' First Amendment rights.[3] Under those precedents, the Government, while it may not interfere with First Amendment rights, need not subsidize those rights either. See infra Point I.A. Indeed, the Supreme Court has repeatedly upheld the denial of Government subsidies, explaining that the harms to protected activity alleged by the plaintiff are due to private financial needs and private choices, not to governmental conduct. The Supreme Court's recent holdings reaffirm this principle. Because the PPFA plaintiffs -- which, like Plaintiffs here, included a DNGO and individuals -- remained free to use non-USAID funds in any way they chose,[4] including promoting abortion through speech and association, the Standard Clause was held simply to have denied a subsidy and not to have worked any interference with First Amendment rights. Accordingly, the "buying off" claim was rejected.

Plaintiffs' "buying off" claim should likewise be rejected. Like the plaintiffs in PPFA, Plaintiffs here remain free to use their private funds in any way they wish, including pro-abortion advocacy and association. For this reason, the Standard Clause is hardly the "gag" rule that Plaintiffs allege. Indeed, as the Complaint makes clear, Plaintiffs have never received any federal funds and expressly disclaim any intent to apply for such funds. Hence, Plaintiffs' claim is even weaker than that of the PPFA plaintiffs, whose budget included USAID family-planning funds and thus was only partially available for pro-abortion activity.

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[3] As in this case, the plaintiffs there included no FNGOs. In any event, FNGOs were held in DKT IV to lack First Amendment rights. See DKT IV, 887 F.2d at 284-85.

[4] They remained similarly free to use USAID funds that were not for family planning.

By Plaintiffs' own admission, 100% of their budget remains free for pro-abortion activity and accordingly their claim is a fortiori controlled by PPFA IV. Moreover, because PPFA IV held that the Standard Clause does not infringe any fundamental right and, in any event, easily satisfies rational-basis scrutiny, PPFA IV requires dismissal of Plaintiffs' equal protection claim as well. See infra Point I.B.

Plaintiffs' remaining claims fare no better. The vagueness claim is legally unsupported, overly general, and based on a misreading of the Standard Clause. See infra Point II. Plaintiffs' international law claims simply lack legal basis. See infra Point III.

Even apart from the merits, the Complaint should be dismissed on standing and ripeness grounds. In the first place, Plaintiffs' claim of harm is vastly attenuated. Plaintiffs are not claiming that they were denied a subsidy. Rather, they complain that certain FNGOs will accept a subsidy and that the acceptance will somehow adversely affect Plaintiffs' speech and association. This alleged secondary harm is too speculative and abstract to confer standing. As noted, Plaintiffs' alleged injury is not constitutionally cognizable because Plaintiffs remain free as ever to use their budget, which is all privately funded, on pro-abortion activity. Moreover, it has already been held repeatedly in other cases that Plaintiffs' alleged harms are due not to the Government, but rather to the financial needs and private choices of FNGOs. Hence, those harms are not fairly traceable to the Government. Finally, the only specific allegation of current harm in the Complaint occurred in a country where abortion as a method of family planning is illegal in any event. Under Pathfinder, the Complaint thus fails to allege facts demonstrating that a judgment for Plaintiffs will redress this one alleged instance of harm. Indeed, for all that appears in the Complaint, the alleged harm occurred as a result not of the Standard Clause but of foreign law, which this lawsuit is powerless to change. If Plaintiffs have standing, then it would be hard to imagine who would not have standing to challenge

Government spending abroad. Any plaintiff could claim that the foreign subsidy restriction, by discouraging overseas groups from espousing a viewpoint shared by that plaintiff, has some negative impact on the plaintiff's ability to espouse that viewpoint domestically. Such a result would essentially nullify the standing requirement. See infra Point IV.A.

This standing analysis assumes arguendo that the alleged harm, however remote, has already happened. But the precise allegation in the Complaint is that the harm "will" happen. Thus, the Complaint should also be dismissed as unripe. Indeed, the DKT IV court dismissed the "buying off" claim on precisely this ground – that the complaint alleged only a hypothetical, future harm. See DKT IV, 887 F.2d at 296-99. The only two specific allegations of harm in the Complaint self-evidently fail to solve the ripeness problem: One alleged harm occurred in 2000, before the Standard Clause was even restored; and the other, as noted, occurred in a country where abortion as a method of family planning is illegal in any event. See infra Point IV.B. For all these reasons, the Complaint should be dismissed.

## STATEMENT OF FACTS

### A. The Statutory Framework

In the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2151 et seq. (the "FAA"), Congress authorized the President "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. § 2151b(b). The assistance for population planning is designed "to increase the opportunities and motivation for family planning and to reduce the rate of population growth." Id.

Recognizing that effective family planning is "often a matter of political and religious sensitivity," 22 U.S.C. § 2151b(a), Congress has imposed certain restrictions on the President's discretion under the

statute, specifically prohibiting the use of United States funds to pay for abortions or involuntary sterilizations as a method of family planning, to motivate or coerce any person to practice abortions or coerce or provide any financial incentive to any person to undergo sterilizations, or to conduct any biomedical research relating to abortion or involuntary sterilization as a means of family planning. 22 U.S.C. § 2151b(f).[5] Funding for all other forms of family planning, such as modern contraceptives, is routinely provided.[6]

With certain exceptions not relevant here, the President has delegated his authority to allocate family-planning funds authorized by 22 U.S.C. § 2151b(b) to the Secretary of State. See Exec. Order No. 12,163, 64 Fed. Reg. 16,595 (1999). The Secretary has redelegated that authority to the Administrator of USAID. See State Department Delegation of Authority No. 145, 64 Fed. Reg. 41,482 (1999).

USAID provides funds, through assistance agreements and contracts, to NGOs. See 22 U.S.C. § 2151b. In evaluating and passing upon applications for assistance agreements, USAID applies a variety of criteria, and has prepared a number of standard provisions for insertion into family- planning assistance agreements with NGOs, including the provisions at issue here. See PPFA III, 1990 WL 26306, at *1; PPFA I, 670 F. Supp. at 539-41. A foreign or domestic USAID recipient may enter into subagreements

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[5]Annual appropriations bills have barred use of FAA funds to lobby for or against abortion. See, e.g., Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001, § 518, Pub. L. No. 106-429, 114 Stat. 1900A-28 (2000); Consolidated Appropriations Act, 2000, Appendix B, § 518, Pub. L. No. 106-113, 113 Stat. 1501A-87 (1999); cf. Compl. ¶ 12.

[6]See http://www.usaid.gov/pop_health/pop/index.html.

awarding the funds it receives. 66 Fed. Reg. 17,303-17,305, 17,308-17,310 (2001).

2. The Mexico City Policy

In August 1984, the United Nations sponsored an international conference on population that was held in Mexico City. PPFA IV, 915 F.2d at 61. The United States delegation to the conference presented a policy statement announcing abortion-related restrictions on the use of foreign aid funds. Id.; PPFA III, 1990 WL 26306, at *1; PPFA I, 670 F. Supp. at 540. The policy statement, which came to be known as the "Mexico City Policy," was prepared and issued by the White House, PPFA I, 670 F. Supp. at 540, and is more restrictive than the limitations contained in 22 U.S.C. § 2151b(f), PPFA II, 838 F.2d at 651.[7] The Policy states:

> [T]he United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations. With regard to the United Nations Fund for Population Activities (UNFPA), the U.S. will insist that no part of its contribution be used for abortion. The U.S. will also call for concrete assurances that the UNFPA is not engaged in, or does not provide funding for, abortion or coercive family planning programs; if such assurances are not forthcoming, the U.S. will redirect the amount of its contribution to other, non-UNFPA, family planning programs.

[7]Hence the basis for issuance of the Policy was 22 U.S.C. § 2151b(b), as well as the President's Article II power to enforce the law and set foreign policy, and not 22 U.S.C. § 2151b(f). See PPFA II, 838 F.2d at 655 (holding that section 2151b(f) does not "address[] the issue of limitations on non-federal funds" and that "Congress has not evidenced any intent on this issue"); cf. Compl. ¶ 4.

> In addition, when efforts to lower population growth are deemed advisable, U.S. policy considers it imperative that such efforts respect the religious beliefs and culture of each society, and the right of couples to determine the size of their own families. Accordingly, the U.S. will not provide family planning funds to any nation which engages in forcible coercion to achieve population growth objectives.
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> U.S. Government authorities will immediately begin negotiations to implement the above policies with the appropriate governments and organizations.

PPFA I, 670 F. Supp. at 540 (quoting Policy).

As a consequence of the Policy, USAID incorporated new provisions, collectively constituting the Standard Clause,[8] in the assistance agreements that recipients sign as a condition of receiving assistance for voluntary family planning.[9] PPFA III, 1990 WL 26306, at *1-2. The requirements for FNGOs are different from those for DNGOs.[10] Id.; compare 66 Fed. Reg. 17,303-17,308 (2001) with id. at 17,309-17,313. The Standard Clause provides that, in order to be eligible for USAID assistance, every FNGO

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[8]The President's memorandum of March 28, 2001, restoring the Policy includes the Standard Clause language. See 66 Fed. Reg. 17,303-17,313 (2001). The only substantive difference between the original Standard Clause and the Standard Clause as restored is that the latter includes the following sentence in the definition of "to perform abortions" and "to actively promote abortion": "Also excluded from this definition is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care." 66 Fed. Reg. 17,311 (2001); see also id. at 17,306. There have also been minor terminological alterations, such as the changes from "AID" to "USAID," "grant" to "award," and "birth spacing" to "child spacing." For purposes of the instant motion, the changes are irrelevant. This memorandum cites and quotes the Standard Clause as restored.

[9]The Policy does not apply to USAID contracts or other USAID acquisition instruments, which therefore do not contain the new provisions. See 66 Fed. Reg. 17,303 (2001); cf. Compl.¶¶ 3, 5, 9, 30, 56. The Policy does apply to USAID grants under contracts.

[10]One part of the Standard Clause governs USAID assistance agreements made directly with DNGOs (including subagreements that DNGOs may make with FNGOs), see 66 Fed. Reg. 17,303-17,308 (2001); the other part governs USAID assistance agreements made directly with FNGOs, see id. at 17,308-17,313. The Standard Clause's restriction on FNGOs' abortion-related activity binds FNGOs whether assistance is provided through a DNGO subagreement or a direct USAID assistance agreement.

must certify in writing as a condition of receiving the assistance that it "will not during the term of this award perform or actively promote abortion as a method of family planning in USAID-recipient countries or provide financial support to any other foreign nongovernmental organization that conducts such activities." Id. at 17,308. The restrictions of the Standard Clause extend to all activities of the FNGO, not merely the projects that are to use the USAID assistance. PPFA IV, 915 F.2d at 61.

DNGOs are not subject to this requirement to be eligible for family-planning assistance. Although DNGOs may not use USAID or other federal monies to perform or promote abortion as a method of family planning, see 22 U.S.C. § 2151b(f), nothing in the Policy or the Standard Clause restricts a DNGO's use of nonfederal funds. PPFA IV, 915 F.2d at 62. Such nonfederal funds may be used by the DNGO to promote or perform abortions in the United States or abroad without any risk to the DNGO's eligibility to receive continued or future USAID funding. Id. Likewise, under the Policy and the Standard Clause, DNGOs are free to provide their own, nonfederal funds to FNGOs for any purpose, including abortion-related activities, id.; cf. Compl. ¶ 41; however, an FNGO that used private funds in this fashion would not be eligible for USAID family-planning assistance, PPFA III, 1990 WL 26306, at *2. A DNGO that enters into subagreements with FNGOs utilizing USAID assistance for family planning may do so only if the FNGO certifies that it will abide by the restrictions of the Standard Clause. 66 Fed. Reg. 17,304 (2001).

Finally, the Standard Clause defines the relevant terms. Abortion is a method of family planning "when it is for the purpose of spacing births," but the definition excludes, inter alia, "abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed

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See, e.g., id. at 17,304, 17,308.

following rape or incest (since abortion under these circumstances is not a family planning act)." Id. at 17,311; see also id. at 17,306. To actively promote abortion means "for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning," id. at 17,311; see also id. at 17,306, but the definition excludes, inter alia, "referrals for abortion as a result of rape or incest or if the life of the mother would be endangered if the fetus were carried to term," id. at 17,311; see also id. at 17,306, and

> passively responding to a question regarding where a safe, legal abortion may be obtained . . . if the question is specifically asked by a woman who is already pregnant, the woman clearly states that she has already decided to have a legal abortion, and the family planning counselor reasonably believes that the ethics of the medical profession in the country requires a response regarding where it may be obtained safely,

id. at 17,311; see also id. at 17,306; cf. Compl. ¶ 60. The definition also protects organizations from the independent acts of their employees or associates. Thus, for purposes of defining "to actively promote abortion,"

> [a]ction by an individual acting in the individual's own capacity shall not be attributed to an organization with which the individual is associated, provided that the organization neither endorses nor provides financial support for the action and takes reasonable steps to ensure that the individual does not improperly represent the individual is acting on behalf of the organization.

Id. at 17,312; see also id. at 17,307.

3. The Second Circuit's Decisions in PPFA

In PPFA, the Second Circuit upheld the Policy and Standard Clause against constitutional and statutory attack. The constitutional challenge was a "buying off" claim. See PPFA IV, 915 F.2d at 63. The plaintiffs in PPFA consisted of DNGOs and individuals whose collective mission was to provide information, education, and advocacy concerning the availability and benefits of abortion, see PPFA IV,

915 F.2d at 62; PPFA III, 1990 WL 26306, at *2-3, *5; PPFA II, 838 F.2d at 650, 652; PPFA I, 670 F. Supp. at 541, 546 n.17, to lobby for abortion rights, see PPFA III, 1990 WL 26306, at *3; PPFA II, 838 F.2d at 652; PPFA I, 670 F. Supp. at 541, 546 n.17; and to work for the reform of abortion law overseas, see PPFA III, 1990 WL 26306, at *3; PPFA II, 838 F.2d at 652. In addition to alleging statutory violations, the plaintiffs claimed that the Policy and Standard Clause violated their First Amendment rights "to speak and advocate . . . and to associate for purposes of such speech and advocacy." PPFA I, 670 F. Supp. at 541; see also PPFA IV, 915 F.2d at 62; PPFA III, 1990 WL 26306, at *1-3; PPFA II, 838 F.2d at 650. Plaintiffs also claimed under the First Amendment that the Standard Clause prevented DNGOs from "receiving or disseminating abortion information" using private funds. PPFA III, 1990 WL 26306, at *5. A plaintiff class similarly claimed, under the right to privacy, that the Policy and Standard Clause "prevent[ed]" U.S. citizens from "receiving . . . 'information"' about abortion. PPFA IV, 915 F.2d at 62 (internal quotation marks omitted); id. at 65; PPFA III, 1990 WL 26306, at *4, *8. In non-legal terms, the plaintiffs claimed that the Policy and Standard Clause deterred FNGOs from working with the plaintiffs on abortion-related activity, and that it was "impractical" for the plaintiffs to engage in their abortion-related work overseas without the participation of FNGOs. See PPFA IV, 915 F.2d at 63.

This Court upheld the Policy and Standard Clause as consistent with the FAA, held the constitutional claims nonjusticiable, and dismissed the complaint. PPFA I, 670 F. Supp. at 542-50. The Second Circuit affirmed the dismissal of the statutory claims, but held that the constitutional claims were justiciable insofar as they challenged USAID's implementation of the Policy (as opposed to the Policy itself). PPFA II, 838 F.2d at 654-56. On remand, this Court dismissed the complaint for failure to state a claim,

finding no violation of the plaintiffs' rights either overseas or domestically. See PPFA III, 1990 WL 26306, at *4-9.

The Second Circuit then affirmed. Following a long line of Supreme Court cases, the Circuit held that the "government's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ." PPFA IV, 915 F.2d at 63 (internal quotation marks and citation omitted). Because the plaintiffs' private funds could still be used to further their abortion-related activity both overseas and domestically, the Circuit held that the Standard Clause did not violate the plaintiffs' rights, and that any incidental effect on those rights resulted from financial choices made by FNGOs and hence did not make out a constitutional violation. Id. at 64. The Court expressly noted the plaintiffs' "buying off" claim – that the Standard Clause "buys off" FNGOs from associating with the plaintiffs on abortion-related projects – and rejected it under subsidy doctrine. See PPFA IV, 915 F.2d at 64-65.

The Circuit also held that, if sustained, the plaintiffs' position would make it "impossible" for the political branches to conduct the nation's foreign affairs. Id. If plaintiffs prevailed, the court explained, then any U.S. citizen with a terrorist or racist agenda could successfully challenge the Government's subsidy of a particular viewpoint abroad – e.g., opposition to terrorist or racist regimes – on the ground that the subsidy discourages the aid recipient from speaking or associating with Americans opposed to that viewpoint. Id. at 64-65. Finally, upholding the Policy under rational-basis review, the Circuit observed that the Policy bars aid even for FNGOs using private funds to perform or actively promote abortion and held that the Standard Clause therefore "goes no further than necessary to implement an otherwise nonjusticiable decision limiting the class of beneficiaries of foreign aid." Id. at 65.

**D. Other Challenges: DKT and Pathfinder**

The only other challenges to the Policy and Standard Clause – the DKT and Pathfinder suits – were filed in the District of Columbia and litigated at the same time as PPFA. In DKT, the plaintiffs consisted of a DNGO and two FNGOs. DKT I, 630 F. Supp. at 239-40; DKT II, 810 F.2d at 1237; DKT III, 691 F. Supp. at 395; DKT IV at 278. Like plaintiff CRLP here, none had applied for USAID funding, been denied USAID funding, or been declared by USAID to be ineligible for such funding. DKT I, 630 F. Supp. at 241-42; DKT II, 810 F.2d at 1238; DKT III, 691 F. Supp. at 396. The DNGO collaborated with and financed other organizations that provided abortion services and information about such services; the FNGOs were two such organizations. DKT III, 691 F. Supp. at 396. The plaintiffs planned to apply jointly for USAID funding for a family-planning project in India that would provide medical services and information but would not provide or involve abortion services. DKT I, 630 F. Supp. at 240; DKT II, 810 F.2d at 1238; DKT III, 691 F. Supp. at 397, 400 & n.5; DKT IV at 282-83. Alleging that the Policy and Standard Clause rendered them ineligible for USAID funding, the plaintiffs brought suit claiming violations of statute, the First Amendment rights of speech and association, and the Fifth Amendment right to due process. DKT I, 630 F. Supp. at 241; DKT II, 810 F.2d at 1237-38; DKT III, 691 F. Supp. at 395, 404; DKT IV at 278 & n.2. Specifically, the plaintiffs challenged the Standard Clause's restrictions not only on DNGOs' subagreements with FNGOs but also on USAID's direct assistance agreements with FNGOs. DKT IV, 887 F.2d 291-96; id. at 294 (characterizing latter as "buying off" claim).

Ultimately, the D.C. Circuit rejected all statutory and free speech claims on the merits, held that the FNGOs lacked standing to bring free speech or association claims, held that the restriction on the DNGO's subagreements with FNGOs did not violate the DNGO's right to associate with the FNGOs, and rejected the "buying off" claim as unripe. DKT IV, 887 F.2d at 282-99.

The "buying off" claim was brought again, and rejected on the merits, in Pathfinder. There, three DNGOs challenged the Policy and Standard Clause, alleging violation of their rights of free speech and association with overseas groups. Pathfinder, 746 F. Supp. at 193. The plaintiffs in Pathfinder expressly alleged the claim dismissed as unripe in DKT IV: that the restriction on direct assistance agreements with FNGOs unconstitutionally burdens the DNGOs' right to associate with them on privately funded abortion-related projects. Pathfinder, 746 F. Supp. at 194. The district court, however, held that, while the Standard Clause prevented the plaintiffs from "associating with their pick of" FNGOs, this limitation was not a "signficant[] burden[]," id. at 199, that strict scrutiny was therefore inapplicable, and that the Standard Clause was proper under rational-basis scrutiny, id.

**E. The Fiscal Year 2000 Legislation**

Section 599D of Appendix B of the Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501A-130-132 (1999) ("FY 2000 Appropriations Act"), required FNGOs to certify that they will not "engage in activities or efforts to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited," using either USAID or non-USAID funds, in order to be eligible to receive FY 2000 population funds appropriated by Pub. L. 106-113 ("FY 2000 Population Funds"). See Compl. ¶¶ 53-55. While making passing reference to the FY 2000 Appropriations Act, Plaintiffs do not challenge it. See id. ¶¶ 132-41.

Former President Clinton exercised statutory authority to waive this certification requirement. Id. ¶ 53. The waiver permitted USAID to provide up to $15 million dollars of FY 2000 Population Funds to FNGOs that would not certify. Id. As provided in the FY 2000 Appropriations Act, the exercise of the waiver resulted in a decrease in the FY 2000 Population Funds from $385 million to $372.5 million, or a

decrease of $12.5 million. FY 2000 Appropriations Act § 599D(a), (c). According to a GAO report, as of August 1, 2000, only nine FNGOs had declined to certify. GAO Report to the Chairman, Committee on Foreign Relations, U.S. Senate, "Foreign Assistance – USAID Compliance with Family Planning Restrictions," at 7 (October 2000). Thus, only about $8.4 million, of the $15 million available, was used to fund non-certifying FNGOs. Id.

**F. The Complaint**

Against the panoply of decisions upholding the Policy and Standard Clause, Plaintiffs have brought suit essentially alleging a "buying off" claim. In legal terms, Plaintiffs claim that the Standard Clause violates their First Amendment rights of free speech and association.[11] Compl. ¶¶ 1-131, 133, 135. Like the plaintiffs in PPFA, Plaintiffs further specify the First Amendment rights allegedly violated by the Standard Clause: the rights to speak, see, e.g., Compl. ¶ 7, associate, see, e.g., id. ¶ 7, advocate, see, e.g., id. ¶ 3, educate, see, e.g., id. ¶ 3, lobby, see, e.g., id. ¶ 18, seek law reform, see, e.g., id. ¶ 5, provide information, see, e.g., id. ¶ 6, and receive information, see, e.g., id. ¶ 6. Plaintiffs also allege violation of the First Amendment right of peaceable assembly, the Fifth Amendment's equal protection component (on the theory that the Standard Clause discriminates on the basis of protected association), Fifth Amendment vagueness doctrine, and international law. Compl. ¶¶ 135, 137, 139, 141. Plaintiffs allege that they not only have

[11]Plaintiffs define the Standard Clause as the "Bush global gag rule," Compl. ¶ 3, and the combination of the Standard Clause and 22 U.S.C. § 2151b(f) as the "law reform gag," Compl. ¶ 5. However, Plaintiffs explain that they challenge section 2151b(f) only insofar as it is a basis for the Standard Clause. Compl. ¶ 4. Because section 2151b(f) is not, in fact, a basis for the Policy or the Standard Clause, see supra at 8 n.7, Plaintiffs are therefore not challenging section 2151b(f). Thus, the claims that Plaintiffs allege, see Compl. ¶¶ 132-41, although referring to the "law reform gag," are in fact challenging only the Standard Clause.

never received any federal funds but also have no interest in receiving any. Id. ¶ 20.

Although Plaintiffs make a vagueness claim under the Due Process Clause of the Fifth Amendment, see Compl. ¶ 139, they make only one specific allegation of vagueness, see id. ¶ 61, as to a portion of the Standard Clause that is clear on its face, see infra Point II. Of the remaining two factual allegations of vagueness, see Compl. ¶¶ 94, 95, neither identifies any allegedly vague portion of the Standard Clause or the unnamed FNGO allegedly chilled by the asserted vagueness. The former also does not allege that the asserted chill caused the unnamed FNGO to avoid discussion with Plaintiffs. See id. ¶ 94. The latter also fails to state whether the CRLP "literature and publications" that the unnamed FNGO declined to distribute had abortion-related content and whether this alleged declination took place in a country where abortion is illegal. See id. ¶ 95.[12]

Of the many sources of international law cited by the Complaint, none creates a private right of

[12]Simultaneously with filing of the Complaint, Plaintiffs moved for a preliminary injunction, but asserted likelihood of success only on the speech, association, and equal protection claims, not on the vagueness and international law claims. See Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, dated June 6, 2001, at 17 & n.7. During the telephone conference with the Court on June 8, 2001, the Government stated its intention to file the instant motion which, because dispositive, would address Plaintiffs' motion insofar as it would seek dismissal of the entire case. The Court did not set a preliminary injunction hearing schedule, but instead set an expedited schedule for the briefing of the instant motion. Accordingly, should the instant motion be denied, the Government respectfully reserves the right to respond with evidence to the preliminary injunction motion.

action. See id. ¶¶ 7, 75-129, 141. Many are also not legally binding documents. See id.

The Complaint contains only two other specific allegations of harm. One concerns an FNGO's conduct in 2000, see Compl. ¶ 114, before the Policy and Standard Clause were even restored. The other concerned FNGOs' conduct in Bolivia, see Compl. ¶ 74, where abortion as a method of family planning is illegal, see The Center for Reproductive Law & Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Latin America and the Caribbean 41 (1997). Otherwise the Complaint alleges that the Standard Clause "will" chill speech, see Compl. ¶ 72, is "expect[ed]" to chill speech, see Compl. ¶ 73, governs "potential" allies, see Compl. ¶ 96, prevents alliance with "potential" partners, see Compl. ¶ 99, and "would" chill FNGO collaboration with Plaintiffs, see Compl. ¶ 110.

## ARGUMENT

## POINT I

### THE FIRST AMENDMENT AND EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED

PPFA IV requires dismissal of the First Amendment claims in this case. Those claims are based on the premise that the Standard Clause essentially buys off Plaintiffs' "potential partner organizations" from associating with Plaintiffs. See, e.g., Compl. ¶ 99. However, Plaintiffs do not dispute that the Policy and Standard Clause, as restored in 2001, are the same for all relevant purposes as they were when upheld in PPFA IV. Moreover, Plaintiffs' First Amendment claims here are essentially the same as those rejected in PPFA, where the plaintiffs, like Plaintiffs here, alleged violation of the rights to speak, associate, educate, advocate, lobby, seek law reform, and provide and receive information. In short, the questions raised by the Complaint were "asked and answered" in PPFA IV: The Standard Clause violates none of Plaintiffs'

First Amendment rights.

In PPFA IV, as here, the plaintiffs asserted that their First Amendment rights were infringed by the requirement, applied to FNGOs, to certify that they do not perform or actively promote abortion. The plaintiffs there, as here, claimed that the Standard Clause's certification requirement effected a "buying off" of those rights. See PPFA IV, 915 F.2d at 63. Under numerous precedents upholding government's power to deny subsidies, the Second Circuit held that, while perhaps incidentally limiting the plaintiffs' ability to associate with FNGOs, the Standard Clause still leaves DNGOs free to use their own funds to engage in every kind of First Amendment activity that they wish. This freedom demonstrated to the Circuit's satisfaction that there was no infringement of any right. So, here, Plaintiffs are free to use their own private funds.

As the Circuit held, the First Amendment does not compel the Government to subsidize or facilitate the exercise of a right – in Plaintiffs' language, to "maximize the effectiveness of [their] speech," see Compl.¶¶ 22-27. Here, in essence, Plaintiffs are asking the Court to maximize the effectiveness of their First Amendment rights by undoing the Government's exercise of its own power to grant or deny a subsidy – an exercise already sustained by the Second Circuit in PPFA IV, where the plaintiffs challenged the same Policy and Standard Clause. See infra Point I.A.1.

While Plaintiffs' arguments are essentially the same as in PPFA IV, they are different from the PPFA plaintiffs in one respect. Plaintiffs in this case – who are asking this Court, in effect, to reexamine PPFA IV and its underlying Supreme Court precedents – can be distinguished on the surface from the plaintiff in PPFA who received USAID funding, since Plaintiffs here receive no USAID funding and are not themselves subject to the Policy or the Standard Clause. But, even assuming that this distinguishes them from the other

plaintiffs in PPFA, this is a distinction without a difference. Whatever the source of their funding, Plaintiffs are challenging the Standard Clause, which governs USAID's funding subsidies and which was expressly upheld, under subsidy case law, in PPFA IV.

If anything, the distinction undercuts Plaintiffs' entire case, and not only because it deprives Plaintiffs of standing, see infra Point IV. Disclaiming all interest in federal funding, Plaintiffs' challenge here is, at most, to an indirect subsidy, in that they claim an entitlement to have others – FNGOs – directly subsidized. But, in reality, Plaintiffs are challenging the very direct subsidy upheld in PPFA IV, and it is only their alleged harm that is indirect and incidental. That Plaintiffs challenge only the speculative effect of subsidy conditions that do not even apply to them, but only to FNGOs, dooms their claim. If the direct subsidy challenge failed in PPFA IV, then a fortiori the indirect subsidy (or indirect effect) challenge brought by Plaintiffs here – a far weaker claim causally – also fails. In any event, the Second Circuit in PPFA IV in fact rejected an indirect, as well as a direct, subsidy claim. For these reasons, Plaintiffs' "buying off" claim is controlled by PPFA IV and should accordingly be dismissed.

Because the PPFA IV holding turned on whether there was infringement, rather than on what was infringed, Plaintiffs cannot distinguish this case by claiming, repeatedly, that they engage in "political speech" or by adding a claim concerning freedom of assembly. See infra Point I.A.2. Furthermore, under subsequent Supreme Court holdings, PPFA IV is still good law. See Point I.A.3. As a result, PPFA IV disposes of Plaintiffs' First Amendment claims.

Although the plaintiffs in PPFA did not bring an equal protection claim, the Second Circuit in PPFA IV issued three holdings that require dismissal of Plaintiffs' equal protection claim here. See infra Point I.B. First, as explained, the Second Circuit held that the Standard Clause does not infringe any of the

fundamental rights asserted by Plaintiffs here. Second, the Circuit held that rational-basis (rather than strict) scrutiny therefore applies. Third, the Circuit upheld the Standard Clause under rational-basis scrutiny. Accordingly, Plaintiffs' equal protection claim must be dismissed under PPFA IV as well.

## A. PPFA IV Compels Dismissal Here

### 4. The Second Circuit's Subsidy Analysis, Informed by Foreign Policy Concerns, Is Dispositive

The Second Circuit began its analysis with a bedrock principle of First Amendment law: "The government's 'decision not to subsidize the exercise of a fundamental right does not infringe the right . . . .'" PPFA IV, 915 F.2d at 63 (quoting Regan v. Taxation With Representation ("TWR"), 461 U.S. 540, 549 (1983)). The Circuit then cited a number of Supreme Court holdings applying this principle. For example, in TWR, the Supreme Court rejected a constitutional challenge to the denial of tax exempt status to a nonprofit entity engaged in lobbying. Acknowledging that lobbying is protected by the First Amendment, the Court distinguished the authority holding that "the government may not deny a benefit to a person because he exercises a constitutional right." Id. at 545; see Perry v. Sindermann, 408 U.S. 593, 597 (1972). Rather, the Court stated, "[t]his Court has never held that Congress must grant a benefit . . . to a person who wishes to exercise a constitutional right." Id. The Circuit also cited Lyng v. International Union, UAW, 485 U.S. 360, 364-69 (1988), where the Supreme Court similarly upheld the constitutionality of a statute providing that no household may become eligible to participate in the food stamp program during the time that any member of the household is on strike or may obtain an increase in its allotment of food stamps because the income of the striking member has decreased. The Court rejected arguments by the unions and members that the withholding of food stamps from strikers constituted economic pressure not to exercise

the right to strike that amounted to an infringement of their associational rights. As the Court recognized, "[s]trikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." 485 U.S. at 368.

The Circuit further relied on Maher v. Roe, 432 U.S. 464 (1977). There, indigent pregnant women challenged, as violative of the right to an abortion, a Connecticut regulation limiting use of state Medicaid funds for nontherapeutic abortion, and the Supreme Court upheld the regulation:

> The Connecticut regulation places no obstacles – absolute or otherwise – in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions is neither created nor in any way affected the by Connecticut regulation.

432 U.S. at 474 (emphasis added).

In all of the precedents cited, the Circuit observed, the government conduct at issue was upheld because "the mere refusal to subsidize a fundamental right 'places no governmental obstacle in the path' of a plaintiff seeking to exercise that right." PPFA IV, 915 F.2d at 63 (quoting Harris v. McRae, 448 U.S. 297, 315 (1980) (government may decide to fund medical expenses incident to childbirth, but not expenses related to abortion)).

In view of this voluminous authority, the Second Circuit in PPFA had little difficulty rejecting the plaintiffs' "buying off" claim:

> [T]he Standard Clause does not prohibit plaintiffs-appellants from exercising their first

> amendment rights. Plaintiffs-appellants may use their own funds to pursue whatever abortion-related activities they wish in foreign countries. Indeed, the Standard Clause permits Planned Parenthood to grant AID funds to a foreign NGO for all aspects of family planning except abortion and to use its own funds to establish an abortion-related facility next door. The harm alleged in the complaint is the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with plaintiffs-appellants.

PPFA IV, 915 F.2d at 64 (emphases added).[13] Thus, a basis for the PPFA IV holding, as for all of its underlying precedents, was causation. Because the constitutional harms alleged were not caused by the Government but rather by the financial needs and private choices of others – here, of FNGOs – the plaintiffs' "buying off" claim failed on the merits.[14]

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[13]When it similarly rejected the plaintiff DNGO's association claims on the merits, the DKT IV court further found no constitutional right of organizations to associate together. Id. at 292, 294-95.

[14]In rejecting constitutional challenges to funding decisions, the subsidy precedents repeatedly cite the plaintiff's failure to establish that government, rather than need or private choice, caused the harm alleged. See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 509 (1989) ("The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a

The Circuit further held in PPFA IV that a judgment for the plaintiffs would have intolerable consequences for American foreign policy, as well as the separation of powers:

> Were the courts to allow challenges to foreign aid programs on the ground that the government's subsidy of a particular viewpoint abroad encourages the foreign recipients of American aid not to speak or associate with Americans opposed to that viewpoint, the political branches would find it impossible to conduct foreign policy. A holding in favor of plaintiffs-appellants in this case would open the possibility of attacks by white supremacists on the policy of the United States with respect to ending apartheid, see 22 U.S.C. §§ 5001-5117, a policy that involves not merely financial incentives for a particular viewpoint but coercive sanctions, see, e.g., 22 U.S.C. § 5081. Opponents of American foreign policy pertaining to international terrorism could contest restrictions on aid to "entities associated with" the Palestine Liberation Organization, see 22 U.S.C. § 2227. Plaintiffs-appellants have not proposed any means of distinguishing between the Mexico City Statement and these other policies directed at non-citizens that have an incidental impact on the first amendment rights of citizens.

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physician affiliated with a public hospital. This circumstance is more easily remedied, and thus considerably less burdensome, than indigency, which 'may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions' without public funding." (quoting Maher, 432 U.S. at 474)); McRae, 448 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); Maher, 432 U.S. at 474 (quoted supra); Buckley v. Valeo, 424 U.S. 1, 94-95 (1976) ("[The law] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions."). The D.C. Circuit court reached the same result when it rejected all of the DKT plaintiffs' free speech claims, see DKT IV, 887 F.2d at 286-90, and association claims, see id. at 293.

PPFA IV, 915 F.2d at 64-65. In DKT IV, 887 F.2d at 289-90, the D.C. Circuit made a similar holding: "It is unthinkable that in order to make [the Government's] encouragement [of the anti-apartheid viewpoint in South Africa] constitutional, the government would likewise have to underwrite efforts to encourage the continuance of the abhorrent and morally repugnant system of apartheid." Id. at 290; see also id. ("Hardly anyone would assert that this title[, permitting federal grants to Radio Free Europe and Radio Liberty for the promotion of the rights of freedom of opinion and expression, see 22 U.S.C. § 2871,] is unconstitutional unless it also requires the United States to make grants opposing the rights set forth in section 2871.").

This foreign-policy rationale reflects respect, under the separation-of-powers doctrine, for the President's plenary power to set the nation's foreign policy: "The President is the sole organ of the nation in its external relations . . . ." United States v. Curtiss-Wright Corp., 299 U.S. 304, 318-19 (1936). As a corollary of this plenary authority, nonresident aliens (including FNGOs) who are beyond the borders of the United States and not within the custody or control of the United States lack rights under the U.S. Constitution. See DKT IV, 887 F.2d at 284-85. Pursuant to his plenary authority, the President may disassociate the United States completely from foreign organizations because of their viewpoints or activities. Thus, in PPFA, where the plaintiffs challenged the President's exercise of this foreign-policy authority in his issuance of the Policy, the Second Circuit held that "the wisdom of, and motivation behind, th[e P]olicy are not justiciable issues." PPFA IV, 915 F.2d at 64.

The DKT IV court reached the same conclusion: "To hold that the United States government cannot make viewpoint-based choices in foreign affairs would be unthinkable. As the Supreme Court has frequently reminded us, 'many [foreign affairs] questions uniquely demand single-voiced statement of the

Government's views."' DKT IV, 887 F.2d at 289-90 (quoting Baker v. Carr, 369 U.S. 186 (1962)). For these reasons, the DKT IV court explained that, although the Policy permits foreign governments (but not FNGOs) to use non-USAID funds for abortion-related activity without jeopardizing their USAID eligibility, this fact is simply a "recognition of the sovereignty and self-determination" of other countries and does not compel the Government to associate with FNGOs whose conduct conflicts with American foreign policy. DKT IV, 887 F.2d at 291.

In sum, Plaintiffs, like their predecessors in PPFA, are simply challenging the Government's "decision not to subsidize" – indirectly, in the form of unqualified USAID funding of FNGOs – "the exercise of a fundamental right." PPFA IV, 915 F.2d at 63. Thus, Plaintiffs' First Amendment claims should be dismissed under PPFA IV because their claims are indistinguishable from those rejected in that case, see infra Point I.A.2.

2. Plaintiffs' "Buying Off" Claim Is Indistinguishable from the "Buying Off" Claim Rejected in PPFA IV

Legally, Plaintiffs' First Amendment claims are no different from the counterpart claims in PPFA IV. Like the plaintiffs in PPFA, Plaintiffs here include a DNGO and individuals, and all bring a "buying off" claim attacking the Standard Clause on the ground that it assertedly violates their rights of speech and association. Under the subsidy cases, the particular manifestation of those rights is irrelevant, because Plaintiffs may freely spend their private funds to exercise all of their rights. Thus, Plaintiffs' repeated allegation that this case concerns "political speech," see, e.g, Compl.¶ 2, does not distinguish this case from PPFA: The holding of PPFA IV turned on whether an infringement took place, not on what particular rights were infringed. In any event, Plaintiffs here allege, and the plaintiffs in PPFA alleged, violation of precisely

the same First Amendment rights:

> •to speak, compare Compl. ¶¶ 7, 19, 22-27, 105, 133, with PPFA IV, 915 F.2d at 62; PPFA III, 1990 WL 26306, at *1-2; PPFA II, 838 F.2d at 650; PPFA I, 670 F. Supp. at 541;
>
> •to associate, compare Compl. ¶¶ 7, 22-27, 104, 135, with PPFA IV, 915 F.2d at 62; PPFA III, 1990 WL 26306, at *1-2; PPFA II, 838 F.2d at 650; PPFA I, 670 F. Supp. at 541;
>
> •to advocate, compare Compl. ¶¶ 3, 16, 19, 21, 23-27, with PPFA III, 1990 WL 26306, at *2-3; PPFA II, 838 F.2d at 650; PPFA I, 670 F. Supp. at 541;
>
> •to educate, compare Compl. ¶¶ 3, 17, 21, with PPFA III, 1990 WL 26306, at *3; PPFA I, 670 F. Supp. at 541, 546 n.17;
>
> •to lobby, compare Compl. ¶¶ 18, 24, 107, with PPFA III, 1990 WL 26306, at *3; PPFA II, 838 F.2d at 652; PPFA I, 670 F. Supp. at 541, 546 n.17;
>
> •to seek law reform, compare Compl. ¶¶ 5, 18, 101, 103, with PPFA III, 1990 WL 26306, at *3; PPFA II, 838 F.2d at 652;
>
> •to provide information, compare Compl. ¶¶ 6, 16, 102, 141, with PPFA IV, 915 F.2d at 62; PPFA III, 1990 WL 26306, at *3, *5; PPFA II, 838 F.2d at 652; PPFA I, 670 F. Supp. at 546 n.17; and
>
> •to receive information, compare Compl. ¶¶ 6, 15, 19, 100, 101, 106, 141, with PPFA IV, 915 F.2d at 62, 65; PPFA III, 1990 WL 26306, at *4-5, *8; PPFA II, 838 F.2d at 652; PPFA I, 670 F. Supp. at 542.[15]

The PPFA plaintiffs further asserted violations of these rights both overseas and domestically. PPFA III, 1990 WL 26306, at *4-9. Nonetheless, under subsidy doctrine, this Court rejected all of the plaintiffs' claims, see id., and the Second Circuit affirmed, PPFA IV, 915 F.2d at 63-66.

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[15]Insofar as the plaintiffs in PPFA IV alleged violation of the rights to advocate, lobby, and seek law reform, their claims are precisely the same as Plaintiffs' "political speech" claim.

Plaintiffs' assembly claim, see Compl. ¶ 135, does not distinguish this case from PPFA. Under the subsidy analysis of PPFA IV, the Standard Clause leaves Plaintiffs free to use their private funds to assemble, as well as to speak and associate, for pro-abortion purposes. Any claimed harm to their right to assemble is similarly due to the financial needs and private choices of FNGOs and not to the Government. Thus, there is no meaningful difference between the legal claims here and in PPFA.[16]

There are further reasons why Plaintiffs' First Amendment claims (and hence their equal protection claim, see infra Point I.B.) are controlled by PPFA IV. First, the indirectness of the subsidy – really, of the alleged harm – at issue makes Plaintiffs' claim far weaker on the merits than was the direct subsidy challenge rejected in PPFA IV.[17] The reason is that the Standard Clause's restriction on DNGOs who actually receive USAID family-planning assistance definitely limits their use of federal funds. In this case, however, the restriction does not apply to Plaintiffs at all. Nor is the alleged harm to Plaintiffs definitely caused by the Standard Clause, since FNGOs have free choice and may decide independently of the restriction to avoid associating with Plaintiffs. In addition, Plaintiffs remain free to use 100% of their budget on all the pro-

[16]Although Plaintiffs make no claim under the Petition Clause, see Compl. ¶¶ 132-41; cf. id. ¶ 7, any such claim would also be identical, for purposes of subsidy analysis, to Plaintiffs' speech and association claims and should similarly be dismissed.

[17]In PPFA, plaintiff PPFA was a DNGO that received USAID funding and thus brought a direct subsidy challenge. By contrast, the individual plaintiffs (and arguably plaintiff Planned Parenthood of El Paso) in PPFA did not receive USAID funding and thus made an indirect subsidy challenge.

abortion activity that they wish. This case thus presents a far less compelling claim of impairment than was presented in PPFA, and Plaintiffs' claims should therefore be dismissed under PPFA IV.

Second, the Circuit in PPFA IV rejected not only a direct subsidy claim but also an indirect subsidy claim. As noted supra at 27 n.17, nothing in the four PPFA opinions indicates that the individual plaintiffs there (and, apparently, plaintiff Planned Parenthood of El Paso) received USAID funding in any form.[18] As a result, their claims were clearly indirect subsidy claims. The Second Circuit rejected them nonetheless. For this reason, Plaintiff's "buying off" claim – which is an indirect subsidy claim – is controlled by PPFA IV and should therefore be dismissed.

Repeatedly, Plaintiffs claim that the Standard Clause denies them the ability to "maximize the effectiveness of [their] speech." See Compl. ¶¶ 22-27. However, the First Amendment does not compel the Government to "maximize the effectiveness" of any right. As the Lyng Court held, the "right of association does not require the Government to furnish funds to maximize the exercise of that right." 485 U.S. at 368. Similarly, the TWR Court held, "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" TWR, 461 U.S. at 546 (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., conc.)). In sum, the essence of Plaintiffs' claim is, as in the classic subsidy case, that certain outlays of Government funding on terms Plaintiffs prefer would make it easier for U.S. citizens to speak or associate, when those citizens are already

[18]Even plaintiff PPFA, which was a USAID-funded DNGO, made grants to FNGOs using its own private funds. See PPFA I, 670 F. Supp. at 541. To that extent, PPFA was advancing an indirect subsidy claim, in addition to its direct subsidy claim.

free to use their own funds to speak or associate. This continuing freedom of Plaintiffs to use their own funds makes this a subsidy case: What matters is not how or where or on whom the Government chooses to spend federal monies, but rather whether, as in this case, the plaintiff citizens are free to use their own funds to speak and associate in any way desired and are actually asking the Government to facilitate (rather than simply permit) the exercise of those rights. Because Plaintiffs lack any right to subsidization, and because Plaintiffs' claims are not meaningfully distinguishable from those rejected in PPFA IV, Plaintiffs' claims should be dismissed.

3. Subsequent Supreme Court Holdings Confirm That PPFA IV Requires Dismissal

Since the issuance of PPFA IV, the Supreme Court's two most relevant holdings have been Rust v. Sullivan, 500 U.S. 173 (1991), and Legal Services Corp. v. Velazquez ("LSC"), 531 U.S. 533, 121 S. Ct. 1043 (2001). Rust confirms the holding of PPFA IV. Consistent with this result, LSC holds that subsidies constituting governmental speech fall under the Rust holding, and thus do not implicate the First Amendment, whereas governmental spending that constitutes private speech – by creating a diversity of viewpoints, as in the limited public forum cases – does implicate the First Amendment. The FAA funding at issue in this case is the exemplar of governmental speech and thus, under LSC, does not implicate the First Amendment.

The line of subsidy cases cited in PPFA IV culminated in Rust, where, as here, the plaintiffs alleged infringement of the right to speak about abortion. Specifically, the plaintiffs brought a First Amendment challenge to federal regulations that barred Title X (i.e., federally funded) projects from counseling about and advocating abortion as a method of family planning. The Court, following TWR, rejected the challenge,

again explaining that private choice, not governmental regulation, had caused the alleged harms to speech:[19]

> Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

500 U.S. at 198-99 (footnote omitted) (emphasis added). Thus, Rust reaffirmed the causation-based rationale for upholding subsidy denials against First Amendment attack.

Moreover, by focusing on private choices, Rust adds another argument against Plaintiffs' First Amendment claims. Plaintiffs clearly knew of the Policy's existence; indeed, one of the Plaintiffs in this case represented amici in PPFA II, 838 F.2d at 650, and DKT IV, 887 F.2d at 276. Thus, Plaintiffs were aware, depending on electoral outcomes, that the Policy could be restored. Plaintiffs nonetheless chose to collaborate with FNGOs that allegedly receive USAID funds, when Plaintiffs could have built their organization around FNGOS who, like themselves, see Compl. ¶ 20, receive no USAID funds. But having made this choice, they cannot now complain that their house is built on shifting sands. See Rust, 500 U.S. at 199 n.5 ("The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. . . . Potential grant recipients can choose between accepting

[19]In Rust, the plaintiffs separately alleged that the regulations violated the right to an abortion, and the Court reaffirmed its holdings in Maher, McRae, and Webster that any interference with the ability to obtain an abortion was caused by indigency and private choices, not by government.

Title X funds . . . or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice."). Accordingly, Rust entirely supports the PPFA IV court's dismissal of the First Amendment claims there.

In LSC, a First Amendment challenge was brought against Congress's restrictions on funding for the Legal Services Corporation ("LSC"). 121 S. Ct. at 1046. Those restrictions barred LSC-funded lawyers from arguing to courts that existing welfare laws were invalid. Id. In upholding the challenge, the Court distinguished between two kinds of Government spending: that designed to promote a governmental message, such as the Title X funding in Rust; and that designed to facilitate private speech by creating a diversity of viewpoints, as in the limited public forum cases.[20] Id. at 1048-50. Because, in welfare litigation, the Government's message is already being delivered by the Government's attorney, and hence falls into the former category, the LSC attorney's message would necessarily be private speech and hence fall into the latter category. Id. at 1049. That the LSC attorney's speech is to be uttered in court, where a diversity of viewpoints and a full airing of ideas is the goal, id. at 1052, confirms the analogy between the LSC attorney's speech and private speech in the limited public forum, id. at 1049. Moreover, the restriction impairs the functioning of the courts by insulating legislation from judicial inquiry and thus is at odds with both the separation of powers and the First Amendment.[21] Id. at 1051-52. Finally, the Court distinguished

[20]The LSC Court took express guidance from its limited public forum cases, such as Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993), and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). See LSC, 121 S. Ct. at 1050. The Supreme Court's recent holding in Good News Club v. Milford Central School Dist., 2001 WL 636202 (June 11, 2001), was also a limited public forum case.

[21]The Court even described LSC's mission as a "Government-funded program for petitioning the courts." Id. at 1052. By contrast, the FAA funding program at issue here is designed to increase the use of

Rust as involving a "programmatic message . . . which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." Id. at 1052.

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family-planning services in developing nations.

Under the principles set forth in LSC, this case falls, with Rust, into the category of governmental speech. FAA funding could hardly be said to create a "diversity of viewpoints." Indeed, the opposite is true, as the foreign-policy holdings of PPFA IV and DKT IV make clear: It is in foreign affairs that the Government has greatest power to make viewpoint-specific judgments about whom to associate with and whom to fund. Hence this case does not remotely implicate the separation-of-powers concerns present in LSC. Only a judgment for Plaintiffs would implicate those concerns, by subjecting the President's plenary foreign-affairs authority under Article II to judicial oversight at the behest of an individual plaintiff. Rather, the Government's foreign spending under the FAA is consummately an expression of the Government's own viewpoint – its foreign policy objectives, and its highly selective decisions concerning which foreign groups to support and which to avoid. Since the funding at issue here exemplifies governmental speech, Plaintiffs' freedom to spend their own funds on the protected activity of their choice means that the Government has not aimed at "the suppression of [their] ideas." LSC, 121 S. Ct. at 1052 (citing TWR, 461 U.S. at 548). Accordingly, the Standard Clause is consistent with the First Amendment, and Plaintiffs' First Amendment claims should be dismissed.[22]

[22]That Plaintiffs' attack on the Standard Clause fails to establish governmental causation of any alleged harm, see supra Point I.A.1., requires dismissal of Plaintiffs' First Amendment claims outright. Although some courts have proceeded nonetheless to scrutiny analysis, see PPFA IV, 915 F.2d at 65;

2. The Equal Protection Claim Should be Dismissed

PPFA IV controls the equal protection claim here. Although the plaintiffs in PPFA IV did not bring such a claim, the Circuit nonetheless made three holdings that dispose of Plaintiffs' equal protection claim: that the Standard Clause did not infringe any of the plaintiffs' fundamental rights; that rational-basis, rather than strict, scrutiny applies; and that the Standard Clause survives rational-basis scrutiny. Accordingly, Plaintiffs' equal protection claim should be dismissed under PPFA IV.

1. The Standard Clause Does Not Infringe Any Fundamental Right

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DKT IV, 887 F.2d at 291, 293-94, such analysis is neither necessary nor required by Rust. In Part III of the Rust opinion, the Court addressed the First Amendment claim and, having found it to be simply a challenge to the denial of a subsidy, rejected it outright and ended the discussion without applying scrutiny. See 500 U.S. at 192-200. Should this Court conclude that PPFA IV (which was decided before Rust) nonetheless requires rational-basis scrutiny, the Government incorporates by reference the arguments made infra at Point I.B.

For the reasons stated supra at Point I.A., the Standard Clause does not infringe any fundamental right of the Plaintiffs under the First Amendment. Since the establishment of such an infringement is a necessary element of Plaintiff's equal protection claim invoking strict scrutiny, see Compl. ¶ 137; TWR, 461 U.S. at 547; PPFA IV, 915 F.2d at 63, that claim must fail.[23]

2. The Standard Clause Is Valid Under Rational-Basis Scrutiny

In PPFA IV, the Second Circuit upheld the Standard Clause under rational-basis scrutiny. This Court should do the same. The Second Circuit reaffirmed its prior holding that the merits of the Policy were nonjusticiable and further held, because the Policy itself requires disassociation from FNGOs engaging in the proscribed activity, that the Standard Clause went no further than necessary to implement the Policy:

> AID's implementation of the executive branch's decision to restrict the class of foreign beneficiaries of American assistance must be upheld if rationally related to the policy goal. . . . Plaintiffs-appellants contend that AID could authorize the use of segregated accounts to allow foreign NGOs to accept restricted funds from AID while expending their own funds for abortion-related activities. While segregated accounts would be less restrictive than the Standard Clause, such accounts would not advance the policy that the United States will "withhold federal assistance from [FNGOs] that perform or actively promote abortions, even if those activities are financed with non-federal funds." Plaintiffs-appellants do not suggest any manner of limiting AID's implementation that is consistent with the policy enunciated in the Mexico City Statement. The Standard Clause goes no further than necessary to implement an otherwise nonjusticiable decision limiting the class of

[23]The DKT IV court rejected a challenge strikingly similar to Plaintiffs' equal protection claim. Compare DKT IV, 887 F.2d at 288-89 (rejecting argument that Standard Clause permits DNGOs to associate (via subgrants) with anti-abortion FNGOs but not with pro-choice FNGOs), with Compl. ¶¶ 7, 137 (alleging that Standard Clause permits U.S. citizens to associate with USAID-recipient FNGOs for anti-abortion but not pro-choice purposes).

beneficiaries of foreign aid . . . .
PPFA IV, 915 F.2d at 65 (citations omitted).

The Second Circuit's holding was broad. Whereas this Court held the Government's interest, as expressed in the Policy, to be "legitimate and substantial," PPFA III, 1990 WL 23606, at *6, the Second Circuit in PPFA IV held that interest completely nonjusticiable, see PPFA IV, 915 F.2d at 65. The Second Circuit further held that there was no narrower means of implementing the Policy than the Standard Clause. Id. Accordingly, under PPFA IV, the Standard Clause certainly survives rational-basis scrutiny. This Court should therefore dismiss Plaintiffs' equal protection claim as well as their First Amendment claims.

## POINT II

## PLAINTIFFS' VAGUENESS CLAIM SHOULD BE DISMISSED

Laws and regulations survive vagueness challenge if they give "fair warning" of prohibited conduct. Colten v. Kentucky, 407 U.S. 104, 110 (1972). In view of this standard, Plaintiffs' vagueness claim should be dismissed for three reasons. First, this is a subsidy case, not a case involving criminal or even civil sanctions. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (courts are more tolerant of vagueness in enactments with civil rather than criminal sanctions because the "consequences of imprecision are qualitatively less severe"). As a result, Plaintiffs cannot shoulder the enormous burden of demonstrating that the consequence of any asserted imprecision in the Standard Clause is of cognizable magnitude under the Fifth Amendment's Due Process Clause.

As the Supreme Court recently held in another subsidy case, NEA v. Finley, 524 U.S. 569 (1998), "although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of

speech or a criminal penalty at stake." Id. at 587-88. While the Court recognized that the terms of the NEA's grant standard were "undeniably opaque," and that, "if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns," id. at 588, the Court nonetheless concluded that, when the Government is awarding selective subsidies, "the consequences of imprecision are not constitutionally severe," id. at 589. Under this broad holding, it is difficult to imagine how Plaintiffs could establish an imprecision of constitutional magnitude, as a matter of law.

Second, the Standard Clause contains scienter requirements. See, e.g., 66 Fed. Reg. at 17,305 (requiring refund from recipients who "knowingly" violate, or who "know[] or ha[ve] reason to know" that subrecipients violate, specified restrictions), 17,310 (same). Such requirements mitigate whatever vagueness concern a rule may raise. See Colautti v. Franklin, 439 U.S. 379, 395 (1979); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); Screws v. United States, 325 U.S. 91, 101-03 (1945); United States v. Sun and Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

Finally, the Complaint's allegations fail to establish vagueness. The Complaint contains only one specific allegation of vagueness: that the definition of abortion as a "method of family planning" gives a nonexhaustive list of exclusions, that the list includes "referrals for abortion as a result of rape, incest or if the life of the mother would be endangered if the fetus were carried to term," and that it is assertedly "unclear whether lobbying a foreign government or conducting a public information campaign to legalize abortion only in cases of rape, incest, or where the woman's life is in jeopardy would violate" the Standard Clause. See Compl. ¶ 61. This allegation simply misreads the Standard Clause.

Under the Standard Clause, all restrictions are not on abortion per se but rather on abortion as a "method of family planning." 66 Fed. Reg. at 17,303, 17,308. As the Standard Clause provides, abortion

in case of rape, incest, or mortally dangerous pregnancy is not a "method of family planning" because "abortion under these circumstances is not a family planning act." 66 Fed. Reg. at 17,306, 17,311. Thus, whatever restrictions there are on lobbying for abortion as a "method of family planning" – indeed, whatever restrictions there are on actively promoting abortion – cannot logically include lobbying for abortion in such cases. Plaintiffs' allegation of vagueness defeats itself.

In addition, the only allegations of chilled activity are speculative and overly general. See Compl. ¶¶ 94, 95. The first allegation states that the Standard Clause "causes many USAID recipient FNGOs to avoid nearly all discussion of abortion, even though such discussion may technically be permissible." Id. ¶ 94. This allegation fails to state what part of the Standard Clause is vague, who the unnamed FNGOs are, and whether it is with Plaintiffs that the unnamed FNGOs avoid discussion. Nor does it escape the generality problem by using the phrase "nearly all."

The other allegation is no clearer, asserting that, because of the Standard Clause, "[o]ne USAID-recipient FNGO . . . has declined to distribute CRLP's literature and publications." Compl. ¶ 95. This allegation fails not only to identify the unnamed FNGO or the assertedly vague portion of the Standard Clause; it also fails to state whether the "literature and publications" had abortion-related content and whether this alleged declination took place in a country where abortion is illegal. See Pathfinder, 746 F. Supp. at 197 (in country where abortion is illegal, alleged chill resulted not from Standard Clause but from country's criminal law).

Accordingly, Plaintiffs' vagueness claim should be dismissed.

## POINT III

## PLAINTIFFS' INTERNATIONAL LAW CLAIMS SHOULD BE DISMISSED

Plaintiffs base some of their claims on treaties that the United States has ratified, namely, the Charter of the United Nations, U.N. Charter, 59 Stat. 1037 (1945), and the International Covenant on Civil and Political Rights, Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (December 19, 1966). See Compl.¶¶ 7, 117-21, 141. These treaties, however, are not "self-executing." That is, they do not grant Plaintiffs any private right of action and may not be relied upon by individuals. Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995); Committee of Citizens v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988); Frolova v. United States, 761 F.2d 370, 373-75 (7th Cir. 1985); Dreyfus v. von Finck, 534 F.2d 24, 30 (2d Cir. 1976). In particular, the Senate and the Executive Branch agreed at the time of ratification that the Covenant articles on which Plaintiffs rely are not self-executing and may not be relied upon by individuals. S. Exec. Rep. No. 23 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (April 2, 1992). Where the political branches have explicitly agreed to preclude an individual remedy under these provisions, it would be particularly anomalous for the Court to recognize one. Cf. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir.) (political branches should have "wide latitude" in judgments "bound up with foreign policy considerations"), cert. denied, 121 S. Ct. 1130 (2000).

Plaintiffs further base their claims on the Universal Declaration of Human Rights, G.A. Res. 218A, U.N. GAOR, 3d Sess. pt. 1, 67th Plea. Mtg., U.N. Doc. A/810 (1948), and the American Declaration of the Rights and Duties of Man, signed May 2, 1948, OAS Off. Rec. OEA/Ser.L/V/II.23 doc. 21, rev.6 (English 1979). See Compl. ¶¶ 7, 122-27, 141. These two Declarations are neither treaties nor binding international agreements. Indeed, at the time of adoption of the Universal Declaration of Human Rights by

the United Nations General Assembly, Eleanor Roosevelt, Chairman of the U.N. Human Rights Commission, who was instrumental in its adoption, stated that the Universal Declaration "is a declaration of basic principles" but "is not and does not purport to be a statement of law or legal obligation." 5 M. Whiteman, Digest of International Law (1965), at 243; see also Haitian Refugee Ctr v. Gracey, 600 F. Supp. 1396, 1405-06 (D.D.C. 1985) (quoting Whiteman and holding that Universal Declaration of Human Rights "is merely a nonbinding resolution, not a treaty," and "provides no right of action for the plaintiffs"), aff'd, 809 F.2d 794 (D.C. Cir. 1987); Carpa v. Smith, No. Civ. 96-1435 PHX EHC, 1998 WL 723153, at *6 (D. Ariz. July 20, 1998) (same); In re Alien Children Educ. Litigation, 501 F. Supp. 544, 593 (S.D. Tex. 1993) (same); Garza v. Lappin, — F.3d —, 2001 WL 669769, at *4 (7th Cir. June 14, 2001) ("the American Declaration of the Rights and Duties of Man . . . is merely an aspirational document that, in itself, creates no directly enforceable rights"); Jamison v. Collins, 100 F. Supp. 2d 647, 767 (S.D. Ohio 2000) (same).

Plaintiffs, while relying on customary international law, see, e.g., Compl. ¶¶ 7, 76, 78, 86, 88, 116, 141, fail to specify the precise customary rule that supports their claim. To the extent that Plaintiffs assert a customary rule protecting the rights of speech and association, Plaintiffs' claim should be dismissed for several reasons. Briefly stated, customary international law is "international law result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law (1987) § 102(2); see, e.g., Jamison, 100 F. Supp. 2d at 767 ("because about 90 countries across the globe still retain the death penalty, no customary international law yet exists to support the prohibition of the death penalty"). The critical factor here is states' practice, not their declarations. Additionally, "a practice that is generally followed but which states feel free to disregard does not contribute

to customary law." Id., cmt c. Above all, U.S. courts resort to customary international law if "there is no treaty and no controlling executive or legislative act or judicial decision." The Paquete Habana, 175 U.S. 677, 700 (1900).

In the first place, Plaintiffs' customary international law claim fails because, insofar as they allege any customary rule at all, it is based on states' declarations, not on states' practice. Even assuming that the Covenant represents practice, rather than mere declaration, there are "controlling executive [and] legislative act[s]," id., that bar Plaintiffs' claim – namely, the Senate's Resolution of Ratification of the Covenant, which resolution adopted, inter alia, the President's proposed reservation concerning free speech. See S. Exec. Rep. No. 23 102d Cong., 2d Sess. 6-7, 21-22 (1992). That reservation, jointly expressed by the President and the Senate, states that the Covenant is more restrictive of free speech rights than is the First Amendment and that the United States will accordingly adhere to the First Amendment. Id. at 21-22. Thus, either Plaintiffs' lack the customary law rights that they claim, or those rights are certainly no greater than the rights protected by the First Amendment. In the latter case, Plaintiffs' claim should be dismissed for the reasons stated supra in Point I: The Standard Clause leaves Plaintiffs free to speak and associate as they wish and with whomever they wish. Moreover, nothing in customary international law requires a nation to subsidize speech or association, or fund foreign groups whose views and conduct are contrary to the foreign policy of that nation.

To the extent that Plaintiffs assert a customary rule protecting abortion-related rights, the Complaint itself establishes that customary international law does not bar laws that prohibit or restrict abortion. Far from the "general and consistent practice of states," what Plaintiffs allege is simply a program of private advocacy by themselves and others. Specifically, Plaintiffs allege that they "engage in political speech and

advocacy designed to promote abortion as an international human right." Compl. ¶ 70. They state that they "[have] worked and will continue to work to guarantee that the right to abortion [is] protected as an internationally recognized human right by . . . customary international law." Compl. ¶ 76. Plaintiffs also assert that their "mission . . . will not be complete until abortion laws here and abroad have been reformed . . . ." Compl. ¶ 85. The essence of these allegations is that states do not generally follow the rules that Plaintiffs advocate. Thus, Plaintiffs fail to state a claim under customary international law.

Plaintiffs further rely on documents adopted at three conferences: the Cairo International Conference on Population and Development, September 1994, see Compl. ¶ 98; the Beijing Fourth World Conference on Women, September 1995, see Compl. ¶ 98; and the Vienna World Conference on Human Rights, June 1993, see Compl. ¶ 128. These documents, however, are non-binding political statements and do not themselves demonstrate the "general and consistent practice of states." Restatement (Third) of Foreign Relations Law (1987) § 102(2).

Finally, Plaintiffs rely on section 502B(a)(1) of the FAA, 22 U.S.C. § 2304(a)(1), and section 302 of the United States International Broadcasting Act of 1994, 22 U.S.C. § 6201. Both provisions, however, are self-evidently statements of policy and do not give Plaintiffs enforceable rights. See 22 U.S.C. § 6201 (stating "policy" of United States); 22 U.S.C. § 2304(a)(1) (describing "principal goal of the foreign policy of the United States"); cf. Clark v. United States, 609 F. Supp. 1249, 1251 (D. Md. 1985) (barring private suit under 22 U.S.C. § 2304(a)(2)).

Accordingly, Plaintiffs' international law claims should be dismissed.

## POINT IV

## THE COMPLAINT SHOULD BE DISMISSED ON STANDING AND RIPENESS GROUNDS

3. Standing

Plaintiffs' claim of harm is too insubstantial and indirect to confer standing.[24] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), sets forth the three-pronged test for standing:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations and footnote omitted). Where a suit challenges government action, the burden to establish standing varies greatly depending on whether "the plaintiff is himself an object of the action (or foregone action) at issue." Id. at 561. If the plaintiff is such an object, "there is ordinarily little question" as to standing. Id. But where, as here,

> a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . . Thus, when the plaintiff is not himself the object of the action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

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[24]Under Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-102 (1998), courts are obligated to resolve all issues of subject matter jurisdiction.

Id. at 562 (citations omitted). Plaintiffs fail each prong of the Lujan test.

4. Injury in Fact

Plaintiffs fail first to satisfy the injury requirement. That requirement is met by actual harm or by imminent harm that is "certainly impending." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); Lujan, 504 U.S. at 564 n.2. The injury must be "distinct and palpable," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), not "conjectural," "hypothetical," "remote," "speculative," or "abstract," National Treasury Employees Union v. United States ("NTEU"), 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citations and internal quotation marks omitted). A mere "setback to [an] organization's abstract social interests" is insufficient to confer standing. Id. Nor can motivation and a genuine interest in a problem substitute for injury. Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 217 (1974); Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Moreover, the denial of federal funds to a provider of services does not implicate the constitutional rights of the recipients of those services. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 785-89 (1980). In First Amendment cases, "[a]llegations of subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of a specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

Given subsidy doctrine, Plaintiffs have failed to allege any injury that would give rise to standing. Not only are they wholly free to use their private funds for pro-abortion advocacy, but their budget also includes no federal funding whatever. While an organization that is, for example, dependent for 95% of its funding on federal sources might plausibly claim that the remaining 5% would not leave it truly free to engage in protected activity, Plaintiffs openly admit that 100% of their budget is privately funded. Compl. ¶ 20. Thus, their own allegations, while perhaps demonstrating a setback to "abstract social interests," NTEU,

101 F.3d at 1427, defeat any claim of "concrete" injury, Lujan, 504 U.S. at 560.

Plaintiffs do not allege that they were denied a subsidy. Thus, Plaintiffs are left to allege that the potential denial of a subsidy for FNGOs will somehow adversely affect Plaintiffs' speech and association. This alleged secondary harm, far from being "certainly impending," Whitmore, 495 U.S. at 158, is precisely what the Supreme Court had in mind when it said that "speculative, " "abstract," and "remote" injury is insufficient to confer standing, see NTEU, 101 F.3d at 1427 (citing cases).

2. Causation

As demonstrated supra at Point I.A.1., Plaintiffs' alleged harms are due not to the Government, but rather to the financial needs and private choices of FNGOs. Because those harms are not fairly traceable to the Government, they do not confer standing. See Lujan, 504 U.S. at 560. That the holdings cited in the causation analysis, see supra Points I.A.1., I.A.3., came from dispositions on the merits, rather than on standing grounds, is of no moment. See United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"). Nothing in those opinions stated that a lack of causation dooming a case on the merits cannot also doom it on standing grounds.

When "intervening factors" – here, the choice of FNGOs – interrupt the chain of causation, the plaintiff lacks standing. This is because "the plaintiff seeks to change the defendant's behavior only as a means to alter the conduct of a third party, not before the court, who is the direct cause of the plaintiff's injury." Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991). So, too, Plaintiffs attack the Standard Clause when the real cause of their alleged harm is the particular decision-making of FNGOs. As a result, Plaintiffs

lack standing. See also Allen v. Wright, 468 U.S. 737, 759 (1984) (holding causal chain too attenuated to establish standing); Albanese v. FEC, 78 F.3d 66, 68 (2d Cir. 1996) (in rejecting claim that federal law limiting use of private funds in elections favored wealthy, to exclusion of plaintiff voters, court held that plaintiffs' claimed injury was not "fairly traceable" to law, which "does not require" but merely "limits" contributions to be made).

Los Angeles v. Lyons, 461 U.S. 95 (1983), is also instructive. There, the plaintiff was injured during an arrest by a police officer who used an illegal and deadly chokehold. The plaintiff sought an injunction based on the prediction that police may, in the future, use the same chokehold. The plaintiff, however, could not name which officers would use the chokehold. The Court accordingly held that the plaintiff lacked standing because the claim of injury rested on a prediction of "what one of a small unnamed minority" would do to him in the future. 461 U.S. at 103. Similarly, insofar as the vast majority of Plaintiffs' standing-relevant allegations speculate that unnamed FNGOs will in the future cease to associate with Plaintiffs because of the Standard Clause, see Compl. ¶¶ 72, 73, 96, 99, 110, Plaintiffs lack standing under Lyons.

3. Redressability

The only specific, non-conjectural harm alleged in the Complaint, see Compl ¶ 74, occurred in a country where abortion as a method of family planning is illegal. See The Center for Reproductive Law & Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Latin America and the Caribbean 41 (1997). Because this lawsuit is incapable of altering foreign law, the Complaint fails to allege facts demonstrating that a victory for Plaintiffs will redress the alleged harm. Under Pathfinder, 746 F. Supp. at 197-99, the Complaint should therefore be dismissed. See Albanese, 78 F.3d at 69 (finding no

redressability because invalidation of law will not decrease amount of money spent by wealthy election candidates).

2. Ripeness

The DKT IV court dismissed the "buying off" claim as unripe, and so should this Court. See DKT IV, 887 F.2d at 296-99. All but two of the allegations relevant to ripeness describe purely hypothetical, future harm – that the Standard Clause "will" chill speech, see Compl. ¶ 72, is "expect[ed]" to chill speech, see Compl. ¶ 73, governs "potential" allies, see Compl. ¶ 96, prevents alliance with "potential" partners, see Compl. ¶ 99, and "would" chill FNGO collaboration with Plaintiffs, see Compl. ¶ 110. These are precisely the sort of unrealized and speculative prognostications that fail to satisfy the ripeness requirement. See DKT IV, 887 F.2d at 296-99.

The Complaint's only two specific allegations of harm fail on their own terms and thus do not solve the ripeness problem. One concerns an FNGO's conduct in 2000, see Compl. ¶ 114, before the Policy and Standard Clause were even restored. The other concerned FNGOs' conduct in Bolivia, see Compl. ¶ 74, where, as noted supra in Point IV.A., abortion is illegal in any event. Thus, all of Plaintiffs' claims should be dismissed as unripe.

## CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Complaint should be granted.

Dated: New York, New York

June 29, 2001

Respectfully submitted,

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